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In The
Supreme Court of the United States
October Term, 2005

LINDA LINGLE, in her official capacity as GOVERNOR OF THE STATE OF HAWAII,
Petitioner,
v.
EARL F. ARAKAKI, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF FLORIDA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, IDAHO, MAINE, MICHIGAN, MISSOURI, MONTANA, NEVADA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether state taxpayers have standing to challenge the actions of state government or state agencies that expend, or involve the use of, state taxpayer dollars, simply because they pay taxes to the state?

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INTEREST OF *AMICI CURIAE*

The States have a compelling interest in preserving the constitutional and prudential standing limitations on plaintiffs seeking to voice generalized grievances—directed at a State's taxing and spending decisions—that are common to all members of the public or citizens of a State. If citizens of a State were granted standing in federal court to challenge state expenditures without demonstrating a concrete, particularized injury, the ability of the States to govern would be seriously impeded and the integrity of our federal system would be jeopardized. The States must be free to pursue their own legislative initiatives and fiscal policies without being subject to unrestrained federal judicial review. Respect for the States as sovereigns thus dictates that federal courts rigorously police the "particularized injury" requirement in suits initiated by state taxpayers challenging a State's taxing and spending decisions.

The Ninth Circuit's decision created uncertainty in the law with respect to this proposition. The otherwise settled view of the circuits is that, absent a particularized injury, a plaintiff's status as a state taxpayer is ordinarily insufficient to confer federal standing to challenge the actions of a state government. Although the States within the Ninth Circuit have a particularly compelling interest in this case, all States have an interest in restoring certainty to the law in light of the federalism implications of the Ninth Circuit's decision.

Because hundreds of thousands, if not millions of taxpayers share the burden of every State's taxing and spending decisions, those decisions are "essentially a matter of public and not individual concern." *See Frothingham v. Mellon*, 262 U.S. 447, 487 (1923). The States have an interest in ensuring such grievances are addressed, as the Constitution contemplates, by the politically responsive branches of government.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision directly conflicts with precedent in the Second, Sixth, and Tenth Circuits, and has created uncertainty in the law.

In order to satisfy the "irreducible constitutional minimum" for standing in federal court, a plaintiff must show that he has suffered an "injury in fact" that is both concrete and particularized. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). To be "particularized," "the injury must affect the plaintiff in a personal and individual way," *id.* at 560 n.1, as opposed to an undifferentiated, "generalized grievance" that is "common to all members of the public," *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). "Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'" *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-222 (1974)). Accordingly, "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

It is settled law that *federal* taxpayers generally lack standing to challenge Congress's taxing and spending decisions because they lack a sufficiently particularized injury. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923); *see also Flast v. Cohen*, 392 U.S. 83, 102-03 (1968) (holding that federal taxpayer status is insufficient to confer standing unless taxpayer "show[s] that the challenged enactment exceeds specific constitutional limitations upon the exercise of [Congress's taxing

and spending] power"). The Court made clear in *Frothingham* that suits premised on federal taxpayer status are not cognizable in federal court because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." 262 U.S. at 487.

In *Doremus v. Board of Education*, 342 U.S. 429 (1952), the Court held that a state taxpayer lacks federal standing to challenge state action unless he has sustained a "direct dollars-and-cents injury" as a result, i.e., unless his claim can be characterized as a "good-faith pocketbook action," *id.* at 434. In so holding, *the Court "reiterate[d] what the Court said of a federal statute [in Frothingham] as equally true when a state Act is assailed*: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, *and not merely that he suffers in some indefinite way in common with people generally.*'" *Id.* (quoting *Frothingham*, 262 U.S. at 488) (emphasis added).

A plurality of this Court confirmed in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), that under *Doremus*, suits premised on state taxpayer status are ordinarily not cognizable in federal courts, *id.* at 613-14; *see also Nike, Inc. v. Kasky*, 539 U.S. 654, 669 (2003) (Breyer, J., dissenting) (commenting that state taxpayers "ordinarily lack federal 'standing'"). According to the plurality, state taxpayers cannot satisfy *Doremus*'s "good-faith pocketbook action" requirement simply by alleging that the existence of the challenged state program or practice results in increased government spending and thereby results in higher taxes. *ASARCO*, 490 U.S. at 614. Given the variables attending state taxing and spending decisions, "[t]he possibility that taxpayers will receive any direct pecuniary relief from [the]

lawsuit is 'remote, fluctuating and uncertain.'" *Id.* (quoting *Frothingham*, 262 U.S. at 487).

In light of *Doremus* and consistent with *ASARCO*, the Second, Sixth, and Tenth Circuits have held that state taxpayers lack standing in federal court to challenge a State's taxing and spending decisions unless they can differentiate some quantifiable injury distinguished from that suffered by other taxpayers. *Board of Educ. v. New York State Teachers Retirement Sys.*, 60 F.3d 106, 110-11 (2d Cir. 1995); *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402-03 (10th Cir. 1992); *Taub v. Commonwealth of Kentucky*, 842 F.2d 912, 918-19 (6th Cir. 1988); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 943-44 (11th Cir. 2003) (recognizing that "state taxpayers [ordinarily] lack a sufficiently personal interest to challenge laws of general applicability, since their injury is not significantly different from that suffered by taxpayers in general"); *Henderson v. Stalder*, 287 F.3d 374, 379 (5th Cir. 2002) ("[I]n cases in which a state taxpayer challenges the constitutionality of a state law, he 'must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, not merely that he suffered in some indefinite way in common with people generally.'") (quoting *Doremus*, 342 U.S. at 434); *Tarsney v. O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) (holding state taxpayers could not state Free Exercise claim absent showing of direct injury). Thus the majority view of the circuits is "that the requirements for federal taxpayer standing announced in *Frothingham* control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged." *Taub*, 842 F.2d at 918.

Ninth Circuit precedent concerning suits premised on state taxpayer standing is irreconcilable with this otherwise settled body of law. The court held in *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984), that state taxpayer plaintiffs satisfy Article III and *Doremus* standing requirements simply by

"[pleading] with specificity amounts of money appropriated and spent [by the state] for allegedly unlawful purposes," *id.* at 1180.[1] Accordingly, there is no requirement under *Hoohuli* that a taxpayer show either (1) that his alleged injury is redressable by (i.e. that will financially benefit from) a favorable decision; or (2) that his alleged injury is different in any way from that of any other state taxpayer.

Hoohuli has been rejected by decisions of at least the Second, Sixth, and Tenth Circuits.[2] *New York State Teachers Retirement Sys.*, 60 F.3d at 110; *Colorado Taxpayers Union*, 963 F.2d at 1401-03; *Taub*, 842 F.2d at 919. In *Taub*, the Sixth Circuit explained why *Hoohuli*'s elimination of a "direct and palpable injury" requirement cannot possibly be correct. The court observed that *Doremus* had not eliminated the requirement—"in fact, the Court in *Doremus* emphasized it by quoting *Frothingham* concerning direct injury and the requirement that a taxpayer-plaintiff allege more than 'merely

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[1] In *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991), a Ninth Circuit panel relied on *ASARCO* for the proposition that "[t]he same constitutional standing principles [applicable to federal taxpayers] apply to those suing in federal court as state taxpayers," *id.* at 1423. However, a subsequent Ninth Circuit panel explained that *Bell* was merely meant to "empl[y] some sympathy toward Justice Kennedy's views," and "should not be interpreted as altering the law of this circuit on state taxpayer standing." *Cammack v. Waihee*, 932 F.2d 765, 770 n.9 (9th Cir. 1991).

[2] Eighth Circuit precedent is less clear on this point. Although the Eighth Circuit in *Tarsney* relied on *Colorado State Taxpayers Union* and *Taub* in dismissing a Free Exercise claim raised by state taxpayers for their failure to identify a direct injury, *Tarsney*, 225 F.3d at 937-38, *Tarsney* does not acknowledge any conflict with *Hoohuli*, and an earlier Eighth Circuit decision appeared to rely on *Hoohuli* in holding, in an Establishment Clause case, that state taxpayers need not demonstrate an increase in their tax burdens to satisfy *Doremus*. *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354, 1358 (8th Cir. 1989); *see Tarsney*, 225 F.3d at 942 (Magill, dissenting) (noting vagueness of majority opinion with respect to *Doremus* and resulting vagueness of Eighth Circuit precedent with respect to state taxpayer standing aside from Establishment Clause context).

that he suffers in some indefinite way in common with people generally." *Taub*, 842 F.2d at 919.

Notwithstanding *ASARCO* and the weight of authority from other courts, the Ninth Circuit in this case declined to retreat from *Hoohuli*. Without significant analysis, the court held that, notwithstanding *ASARCO*, "*Hoohuli* remains the law of the circuit until our court, sitting en banc, overrules it, or until the Supreme Court, in a majority opinion, plainly undermines its principles." Pet. App. at 24. The Ninth Circuit's holding that *ASARCO* has no precedential value confirmed the existence of a direct split of authority between the Ninth Circuit on one hand and at least the Second, Sixth, and Tenth Circuits on the other. *See* discussion *supra* n.2. Given the federalism implications of the Ninth Circuit's decision, certiorari is necessary to restore certainty to the law.

II. The Ninth Circuit's evisceration of Article III's particularized injury requirement in cases initiated by state taxpayers dramatically undermines state sovereignty.

The "constitutional commitment to federalism" is "seriously undermine[d]" if the Article III standing requirements can be relaxed to permit a state taxpayer, suing solely as such, to challenge state taxpaying and spending decisions in federal court. *Tarsney*, 225 F.3d at 938; *Colorado Taxpayers Union*, 963 F.2d at 1403; *accord, e.g.*, *Taub*, 842 F.2d at 919 ("[W]hen State taxpayers attack state spending in federal court, [it implicates] the integrity of our government's federalist structure.") (quoting *Hoohuli*, 741 F.2d at 1183 (Wallace, J., dissenting)). Accordingly, "[c]onsiderations of federalism should signal [caution] when a state taxpayer seeks to have a federal court enjoin the appropriation and spending activities of a state government." *Taub*, 842 F.2d at 919.

A State's autonomy in its conduct of fiscal affairs is central to its sovereign status. *See Taub*, 842 F.2d at 919 ("State

sovereignty extends to the total conduct of a state's fiscal affairs."). Thus federalism concerns are implicated any time a state taxpayer seeks to have a federal court enjoin the taxing and spending decisions of a state government. While a state citizen who can allege a special injury as a result of a state's constitutional violations should generally be free to initiate a federal suit, state citizens should not be able to use the federal courts to voice generalized grievances with a State's taxing and spending decisions.

The purposes of the particularized injury requirement—to differentiate the business of courts from the business of the political branches of government, *Lujan*, 504 U.S. at 576, and to ensure that "relief can be framed no broader than required by the precise facts to which the court's ruling would be applied," *Warth*, 422 U.S. at 508 (internal quotation omitted)—have heightened significance in this context. If state taxpayers have federal standing to voice generalized grievances with state taxing and spending decisions, they will have little incentive to raise those concerns before the politically responsive branches of state government. *See Tarsney* 225 F.3d at 938; *cf. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) ("To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"); Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 Emory L.J. 771, 845 (2003) ("[M]any of the state and municipal taxpayer cases suggest [that] taxpayers seek the assistance of federal court judges to decide disputes that include a range of issues that are picayune: university and college class offerings, city contracts and bidding procedures, intramural sport rules and requirements.") (footnotes omitted). The resulting

"[u]nnecessary or abstract decisions . . . could unduly constrict experimental state welfare legislation and undermine local self-determination." *Colorado Taxpayers Union*, 963 F.2d at 1403 (quoting *Hoohuli*, 741 F.2d at 1183 (Wallace, J., dissenting)); *Taub*, 842 F.2d at 919; *see also* Staudt, 52 Emory L.J. at 845 (arguing that particularized injury requirement in state taxpayer standing cases is sensible because, otherwise, "the federal courts begin to play the role of ombudsman for states . . . ").

Accordingly, the federal structure of the Constitution requires the federal courts be more, not less, vigilant in policing Article III's "case or controversy" requirement when a State is hailed into federal court and forced to defend a sovereign interest as sacrosanct as its authority to tax and spend free of federal interference. *Cf. Dawson v. Childs*, 665 F.2d 705, 709 (5th Cir. 1982) ("Under our federalist system, the state governments no less than the federal government possess certain unalienable powers that the other may not encroach upon. . . . Of all such areas, the field of state taxation is perhaps the most important."). "The mere allegation of federal constitutional violations cannot be allowed to clothe a state governmental decisionmaking process with the ill-fitting garments of federal court scrutiny." *Colorado Taxpayers Union*, 963 F.2d at 1403. Instead, respect for the States as sovereigns requires the federal courts, "before permitting a plaintiff to challenge state governmental activity, . . . to ensure, with careful attention, that the parties before it have the requisite concrete adverseness that will ensure full presentation of the issues and avoid unnecessary intrusion into state governmental processes." *O'Sullivan v. City of Chicago*, 396 F.3d at 854 (7th Cir. 2005).

The Article III "particularized injury" requirement precludes taxpayers from "employ[ing] a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *See Flast*, 392 U.S. at 106. The policy rationale underpinning this requirement is at least as strong in this context—where state taxpayers attempt to utilize the federal

courts to air generalized grievances directed at their state government—as it is in an all-federal action. The Ninth Circuit erred in reaching the opposite conclusion.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

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